82-2090

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1983

No.

STUART BISSETTE, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
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Post Office Box 11549
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ATTORNEYS FOR RESPONDENT.

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QUESTIONS PRESENTED

I.

Did the trial court err in refusing to allow Petitioner to inquire whether Robin Chapman and Danny Butler were confidential informants or in refusing to allow Petitioner to inquire into any potential prejudice, bias or motivation of Chapman and Butler when such questions were irrelevant to Petitioner's trial?

II.

Did the trial court err in refusing to declare Officer Gary Michell a hostile witness when Petitioner did not show that he was harmed by Officer Michell's testimony at trial?

III.

Did the trial court err in requiring Petitioner to appear in court before the identification witness?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21907, filed April 20, 1983, as reproduced in Petitioner's Appendix A at pages 38-45.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

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II.

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ARGUMENT

I.

The trial court did not err in refusing to allow Petitioner to inquire whether Robin Chapman and Danny Butler were confidential informants or in refusing to allow Petitioner to inquire into any potential prejudice, bias or motivation of Chapman and Butler because such questions were irrelevant to Petitioner's trial.

The questions of whether Robin Chapman or Danny Butler were informants or had any prejudice, bias or motivation against Petitioner were totally irrelevant to any issue before the trial court.

The State's case consisted of the testimony of Mark Keel, the undercover SLED agent who bought hashish and cocaine from Petitioner; the testimony

of Grady A. Layton, the SLED chemist who identified the substances marked into evidence as 6.33 grams of hashish and 2.1975 grams of cocaine; and the testimony of Wayne Howard, a Florence County Sheriff's Deputy, who observed Officer Keel meeting an individual at Bissette's Exxon on both occasions when the illegal drug sales were made.

SLED Agent Mark Keel testified that on July 25, 1980, he rode in an automobile driven by Miss Robin Chapman to Stuart Bissette's Exxon at approximately 9:00 p.m. He testified that at approximately 9:17 p.m. Petitioner drove up and he and Petitioner got out of their automobiles and had a conversation. He testified that they returned to Petitioner's automobile where Petitioner opened the door to his automobile and obtained a

plastic bag from under the dash, which Petitioner represented to the officer as being seven and one-half grams of hashish and which Petitioner sold to the officer for sixty ($60.00) dollars.

Officer Keel testified that on August 15, 1980, at approximately 8:45 p.m., he rode in an automobile with Robin Chapman and Danny Butler to Bissette's Exxon where they found Petitioner inside the station. Officer Keel testified that he alone got out of the automobile and entered the station where he met Petitioner, who locked the door behind the officer. He testified that he and Petitioner went into a back room where Petitioner sold the officer uncut cocaine for four hundred and twenty ($420.00) dollars, and then gave the officer his business card in case he needed more drugs.

During cross-examination, Officer Keel was asked whether Robin Chapman was an informer. The solicitor objected and the trial court properly sustained the objection.

Petitioner testified that on July 25, 1980, he was at his station at the time of the alleged sale, but he denied making any sale. He further testified that on August 15, 1980, he was sick and did not go to work at his station. On direct and cross-examination, Petitioner denied having ever seen Officer Keel before January 15, 1981, the date of his arrest. During the defense case the trial court refused to allow Petitioner to admit evidence concerning circumstances surrounding a prior arrest of Danny Butler and his prior arrest record.

Under the facts of this case, whether Robin Chapman was an informer was totally irrelevant to the issues before the Court. State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973); State v. Barron, 266 S.C. 433, 223 S.E.2d 859 (1976). Further, since neither Chapman nor Butler actually participated in the drug purchases or was called as a witness, the existence of bias or prejudice by these individuals against Petitioner was totally irrelevant to any issue in the case and was properly excluded. 7 West's South Carolina Digest, Criminal Law, §338.

The South Carolina Supreme Court properly held these exceptions to be without merit.

II.

The trial court did not err in refusing to declare Officer Gary Michell a hostile witness because Petitioner did not show that he was harmed by Officer Michell's testimony at trial.

Petitioner alleges that the trial court erred in refusing to declare Officer Gary Michell a hostile witness, and thereby denied Petitioner an opportunity to cross-examine the witness.

The record reflects that Officer Michell of the City of Florence Police Department testified at the preliminary hearing from the notes of Officer Mark Keel. Officer Keel was the SLED agent sent from Columbia who bought the drugs from Petitioner and who testified at trial. Officer Michell was one of the

officers who had observed Officer Keel from a distance of one and a half blocks during the illegal drug sales.

In its opinion in the present case, the South Carolina Supreme Court stated the following:

> The State did not call Officer Michell but defense counsel did. He asked Officer Michell: "Did you see Stuart Bissette in person that night?" He was obviously referring to July 25th when, according to the testimony, the Defendant drove in the blue Pontiac back to the filling station after it was closed and met Officer Keel and the informer. Michell's answer to the question was as follows:
>
> > Yes, sir. I'm not going to say 100 per cent for sure that it was him, but it

> was his vehicle and it appeared to be him driving the car. I did not speak with him; I did not shake hands with him or anything like that, but it appeared to be him driving the vehicle.

Based on the difference in the testimony, the defense counsel asked that Michell be declared a hostile witness, which was refused. This is alleged to be error. The matter of declaring a witness hostile is for the discretion for the trial judge. State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976). A witness should not be declared hostile except upon a showing of both actual surprise and harm. State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968). From a

> review of the entire record we are of the opinion that even if it be found that defense counsel was taken by surprise, no harm or actual prejudice has been shown. It is apparent that the jury simply did not believe the Defendant and his alibi witnesses.

Under the circumstances of this case, it is clear that Petitioner was not harmed by the trial court's ruling. The South Carolina Supreme Court properly held these exceptions to be without merit.

III.

The trial court did not err in requiring Petitioner to appear in court before the identification witness.

Petitioner alleges that the trial court erred in requiring him to appear

at trial before an identification witness. The allegation, however, is not supported by the record. The record reflects that prior to trial, Petitioner's counsel advised the court that the defendant had consented to being tried in his absence. The solicitor then moved for a bench warrant and to escheat the appearance bond that Petitioner had posted. Defense counsel advised the trial court that Petitioner was in the courthouse within ear shot of the courtroom, but had not appeared because the defense felt there was an identification problem on behalf of the State's witness, Officer Keel.

Defense counsel then moved to sequester Officer Keel. The trial court denied the motion to sequester only one witness but offered to sequester all witnesses. Defense counsel never gave a

positive response to this offer. The trial court then granted the State's motion, but informed defense counsel that the court would hear him further on the matter when the bench warrant was served. The defense counsel then chose to bring Petitioner into court, but excepted for the record. The trial court again pointed out to defense counsel that Petitioner was not required to be present but was coming into court voluntarily.

It is not violative of any principle of law to require a defendant to appear in court for purposes of identification. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed.2d 102 (1910). Further, the record is clear that the trial court did not refuse

Petitioner's motion to sequester the State's witness but expanded the motion to include all witnesses, whereupon Petitioner made the election to appear. There is nothing in the record to sustain an allegation that the procedure used was so impermissibly suggestive as to give rise to a likelihood of misrepresentation. State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980). To make the assumption the Petitioner would make, one would have to assume that the officer did not know the Petitioner until he entered the courtroom and would lie under oath about his identification. The record does not support such an assumption.

The South Carolina Supreme Court properly held these exceptions to be without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

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Assistant Attorney General

ATTORNEYS FOR RESPONDENT.